IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.1256 OF 2005

Dharam Shevaram Rajpal ...Petitioner

Vs.

Maganlal Shevaram Rajpal & Ors. ...Respondents

Shri. V. Z. Kankaria for the Petitioner.
Shri. S. M. Oak for the Respondent No.1.

CORAM : A.S.OKA, J.

DATE ON WHICH
JUDGMENT IS RESERVED : JULY 18, 2005.

DATE ON WHICH
JUDGMENT IS PRONOUNCED: AUGUST 04, 2005.

JUDGMENT :

1. The challenge in this Petition under Article 227 of the Constitution of India is, inter alia, to the order date 31st December, 2004 passed by the learned Judicial Magistrate, First Class at Uran by which warrant of attachment of the property of the accused (Respondent No.3 herein) was ordered to be issued. The challenge is also to the judgment and order dated 13th April, 2005 passed by the learned Judicial Magistrate, First Class, Uran by which an Application made by the Petitioner under Section 84 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code of 1973) was rejected.

2. The Respondent No.1 herein filed a complaint under section 138 of the Negotiable Instruments Act against the Respondent Nos.2 and 3 herein in the Court of the Judicial Magistrate, First Class at Uran. The

case of the Respondent NO.1 is that the Respondent Nos.2 and 3 are partners of M/s. Om Enterprises. The Respondent No.3 is the son of the Petitioner and the the Respondent No.1 is the brother of the Petitioner. It appears that the Respondent No.3 is absconding. A warrant and subsequently a proclamation was issued against the Respondent No.3. The Respondent No.3 failed to appear before the learned Magistrate and therefore, on Application made by the Respondent No.1, the learned Judicial Magistrate, First Class by order dated 31st December, 2004 ordered attachment of the house property of the Respondent No.2 bearing Municipal House No.86B(1) at Uran, District Raigad. The order of attachment was passed under section 83 of the said Code of 1973.

3. The Petitioner herein made a claim under section 84 of the said Code of 1973 raising objection to the attachment. The said claim was made in the form of Criminal Miscelleneous Application No. 06 of 2005. The contention of the Petitioner in the said Application was that the property under attachment is purchased by him. His case is that he is in possession of the house property and is staying alongwith the other family members. Other contention raised is that the Respondent No.3 is not staying in the said house for last about ten years. The said Application was rejected by order dated 10th January,

2005. The learned Sessions Judge in the Revision Application filed by the Petitioner, by judgment and order dated 16th February, 2005 remanded the Miscellenous Application No.06 of 2005 to the learned Magistrate for fresh enquiry. By impugned order dated 13th April, 2005, the learned Judicial Magistrate rejected the said Application holding that the Petitioner has no right, title or interest in the house property.

4. Shri. Kankaria, learned Counsel appearing for the Petitioner submitted that the house property was not of the ownership of the Respondent No.3 and in fact it was purchased by the Petitioner-father though it stands in the name of the Respondent No.3. He submitted that the wife of the Respondent No.3 has made payment of Rs.1,15,000/- to the Respondent No.1 in full and final settlement of the claim of the Respondent No.1 against the Respondent No.3. He relied upon a copy of receipt dated 6th October, 1995 which records the alleged compromise. He submitted that it is not uncommon that a father purchases a house property in the name of his son and therefore, merely because property is standing in the name of the Respondent No.3, it cannot be said that the Petitioner has no right, title and interest. Shri. Kankaria relied upon the affidavit dated 6th July, 2005 filed by the Petitioner. In the said affidavit it is stated

that the Petitioner is ready and willing to deposit sum of Rs.2,30,000/- in the Trial Court in addition to sum of Rs.1,15,000/- paid by the wife of the Respondent No.2 to the Respondent No.1. It is stated in the affidavit that if the Trial Court decides the complaint in favour of the Respondent No.1, the amount can be permitted to be withdrawn by the Respondent No.1. In the said affidavit it is stated that even the Petitioner is not aware of the whereabouts of the Respondent No.3. He, therefore, submitted that as Petitioner is ready to deposit the entire cheque amount, the order of attachment deserves to be vacated.

5. Shri. S. M. Oak, appearing for the Respondent No.1 submitted that the Respondent No.3 has absconded and therefore, order of attachment can be vacated only if he appears before the Court. He submitted that the Petitioner has no right, title or interest in the said house and therefore, the Petition deserves to be dismissed.

6. I have considered the rival submissions. Perusal of the judgment and order passed by the learned Magistrate shows that a submission was made before him that the property in question is purchased by the Petitioner being ‘karta’ of Hindu Undivided Family though it stands in the name of the Respondent

No.3. It must be noted here that assertion in the Application made by the Petitioner is that infact the Petitioner has purchased the property in question. In the assessment record, the property stands in the name of the Respondent No.3. The learned Magistrate held that the Petitioner failed to prove that he has purchased the property in his capacity as ‘karta’ of Joint Hindu Family. The learned Judge observed that there are three other sons of the Petitioner who have been occupying three flats in ‘Goukuldham’ building standing in their respective name and out of the three flats one flat has been sold by a son Laxman. The learned Magistrate observed that the Petitioner did not produce a copy of Sale Deed of the property. Though the Petitioner admitted that he was paying income tax, he failed to produce income tax returns on record. The learned Judge has noted that at one stage, case was made out that the wife of the Respondent No.3 had relinquished her right, title and interest in the property in favour of the Petitioner.

7. As stated earlier the the property is in the name of the Respondent No.3. In the Application, stand taken by the Petitioner is that he purchased the property in the name of the Respondent No.3. A different stand was taken at the time of hearing of the Application by contending that the Petitioner has purchased the property as ‘karta’ of Hindu Undivided

Family. There is absolutely no evidence placed on record to show that the undivided family existed on the date of purchase and the property is purchased by the said family. As stated earlier, even the title document of the said property is not produced on record. The burden was on the Petitioner to establish his right, title and interest in the property in dispute. The Petitioner did not produce his income tax returns though he is admittedly a tax payer. Considering all these aspects, it is very difficult to find fault with the findings recorded by the learned Magistrate while rejecting the objection of the Petitioner to the attachment.

8. The alleged settlement between the wife of the Respondent No.3 and the Respondent No.1 is not relevant for decision of this Petition. The criminal complaint is still pending. As a consequence of the Respondent No.3 remaining absent, proclamation was ordered to be issued and the Respondent No.3 failed to appear before the Court even after the proclamation was issued. Under section 83 of the said Code of 1973, the learned Magistrate had power to attach the property of the Respondent No.3 who is absconding. Therefore, the alleged settlement will not help the Petitioner.

9. The suggestion made by the Petitioner to

deposit the entire cheque amount of Rs.2,30,000/- prima facie appears to be attractive. The Petitioner has stated that the Respondent No.1 can withdraw the said amount if he succeeds in the complaint against the Respondent No.3. The said offer is of no consequence as unless the Respondent No.3 appears before the Trial Court, the trial may never proceed against him. Perusal of the provisions of the Section 85 of the said Code of 1973 shows that on the ground of deposit of the said amount, the property cannot be released from attachment. Once it is found that the attachment of the property was validly made and the objection of the Petitioner to the attachment cannot be accepted, in view of Section 85 of the said Code of 1973, the property can be released from the attachment only if the Respondent NO.3 appears before the Trial Court. His father i.e. the Petitioner has stated in the Application that he is not aware of the whereabouts of the Respondent No.3. The attachment can be removed only if the Respondent No.3 appears before the Court. Section 85 of the said Code of 1973 provides that if the proclaimed person does not appear within a time specified in the proclamation, the property under the attachment shall be at disposal of the State Government. But, it shall not be sold until the expiration of six months from the date of attachment and until any claim preferred or objection raised under section 84 of the said Code of 1973 has

been disposed of. Therefore, once the Respondent No.3 fails to appear within the time specified in the proclamation, the property under attachment will be at the disposal of the State Government. The property cannot be sold until expiration of six months from the date of attachment and until the decision of the claim preferred under section 84 of the said Code of 1973. The period of six months has already elapsed from the date of attachment and therefore, now the property is available at the disposal of the State Government for sale. Therefore, even if the Petitioner deposits the amount, the sale of the property cannot be stopped contrary to the express provisions of the said Code of 1973.

10. It is not in dispute that the Petitioner has not been dispossessed. Under sub-section 4 of Section 83 of the said Code of 1973, if immoveable property is attached which is a land paying revenue to the State Government, the attachment has to be effected through the Collector and in all other cases of immoveable property, the attachment has to be effected by taking possession; or by the appointment of a receiver; or by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf; or by all or any two of such methods as the Court may deem fit. It is not in dispute that the Petitioner is in possession of the

house property. The Petitioner is stated to be sixty six years old and is staying in the suit property alongwith his wife. By virtue of Section 85 of the said Code of 1973, now the said property is available at the disposal of the State Government Considering the old age of the Petitioner and considering the fact that he is residing in the house property, a reasonable time deserves to be granted to the Petitioner to vacate the property. Within the time granted to vacate the property, if the Respondent No.3 appears before the Trial Court, consequential order under Section 85 of the said Code of 1973 will be obviously passed. In my view, time of six months deserves to be granted to the Petitioner subject to condition that the Petitioner will give undertaking in writing to this Court not to create third party interests in the suit property and not to part with the possession of the suit property. Similar undertaking will have to be given by the wife of the Petitioner.

11. Hence, I pass the following order:

: O R D E R :

i) The Writ Petition is dismissed with no orders as to costs.

ii) The possession of the property attached shall not be taken over for a period of six months from today subject to condition of the Petitioner and his wife filing an undertaking in writing in this Court within a period of two weeks from today stating therein that they are in exclusive possession of the property and that they will not part with the possession of the suit property and will not create any third party interests in the property.

iii) If undertaking is not filed within the stipulated time, the possession of the property shall be forthwith taken by exercising power under Section 83(4) of the Code of Criminal Procedure, 1973.

iv) If the Respondent No.3 personally appears before the Trial Court within the said period of six months, the learned Trial Judge will be free to pass consequential order under Section 85 of the said Code of 1973. If the Respondent No.3 fails to appear within a period of said six months, the action under sub section 4 of Section 83 and Section 85 of the said Code of 1973 will be forthwith taken by taking possession of the property in question.

v) Parties to act upon an authenticated copy of this order.

JUDGE